2002

Bingham and Garfield Railway company, a Corporation v. North Utah Mining Company of Bingham, a corporation, the right honorable William Hood Lord Waleran, the honorable Cyril A. Liddle, Isaac W. Dyer and William Robbins : Brief of Respondent

Utah Supreme Court

In the Supreme Court of the State of Utah.

FEBRUARY TERM, 1916

BINGHAM & GARFIELD RAILWAY COMPANY, A CORPORATION,
Plaintiff and Appellant,
vs.
NORTH UTAH MINING COMPANY OF BINGHAM, A CORPORATION, THE RIGHT HONORABLE WILLIAM HOOD LORD WALERAN, THE HONORABLE CYRIL A. LIDDLE, ISAAC W. DYER AND WILLIAM ROBBINS,
Defendants and Respondents.

No. 2877

BRIEF ON BEHALF OF RESPONDENTS, OTHER THAN WILLIAM ROBBINS

E. O. LEATHERWOOD, and
P. T. FARNSWORTH, JR.,
Attorneys for Respondents, Other than William Robbins.

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The so-called Red Wing Group, which consists of thirteen patented claims and four unpatented claims, is one contiguous group and it is uncontradicted, in the evidence, that said claims which are named and set forth in the answer of these respondents (Abs. 12) were, at all times in question, the property of these respondents. It is further uncontradicted in the evidence that this group of claims has in the past been worked by means of three tunnels, numbered one, two and three,

respectively, all of which tunnels are in the immediate vicinity of Tract A. Their position with respect to Tract A and the dumping space and swale there present, is shown on the model to which the Court's attention was called upon oral argument, although certain of the photographs give a more accurate representation of the situation.

Many of the witnesses produced on behalf of appellant, without hesitation admitted that the natural dumping ground for any mining operations, in the vicinity of these workings, was in this swale, although a large amount of evidence was offered by appellant to the effect that there still remained available dumping space east of the right of way. This contention of the witnesses for appellant was emphatically denied by Dr. Talmage and other witnesses for respondents. At the foot of the slope, east of the right of way, lie the homes of citizens of Bingham, which are built very closely together along the roadside in Markham Gulch. Dr. Talmage states that a practical mining operator, having regard for the rights and safety of the public, would not attempt to make any extended use of the ground east of the right of way for dumping purposes. (Trans. 2212-2213.) It would be impracticable to dump on any portions of the swale outside of Tract A, for the reason that the material would run into the right of way, and the abutments of the railroad are in the bottom of the swale. (Abs. 144-147.)

We invite the Court's attention to the pictures which are in evidence and believe that it will be apparent from

a mere inspection of the contour of the country that Dr. Talmage is right when he states that dumping space in Markham Gulch is extremely scarce and that by the action of appellant in this case, we have been deprived of our ability to work this property unless we begin anew at some point at the top of the hill where dumping space will be available and where the cost of opening up our property and operating same will amount to a very substantial sum—many times the gross amount assessed by the jury in our favor here.

If the mere presence of the railroad running as it does, through the heart of our property, did not itself inhibit the carrying on of operations in this vicinity, and if we might continue to carry on our work through these tunnels, the cost of hauling away the material which otherwise might have been dumped in the swale would amount to $13,000. (Abs. 289.)

Not including any cross-cuts or other lateral workings, there is a gross footage of 1850 feet in these three tunnels. (Trans. 319.) The cost of driving these tunnels would be a minimum of $12,950. (Trans. 326-327.) By the overwhelming weight of the testimony, the mere presence of the railroad at this point has wholly deprived us of the benefit of these workings.

The market value of Tract A alone was $8,000.00 at the time of the order of possession (Abs. 302), aside from any injury to the remainder of the property.

The one available and desirable site for a shaft was in the vicinity of tunnel No. 1. (Trans. 309-312; Abs. 128-129; Abs. 198-200.) Deprived as we are of that site

for a shaft, the only remaining practicable course left for us is to sink our shaft in the vicinity of the Snake Tunnel on the top of the hill, which operation alone would involve an expenditure of $17,100.00, exclusive of equipment and exclusive of additional cost of operation, before we would attain the level of our upper tunnel, to-wit, tunnel No. 1. (Trans. 325.)

While it is true, as stated by Mr. Schulder upon the oral argument, that practically no work has been done upon the Red Wing Group since these respondents acquired title, and the history and financial difficulties of the North Utah Company has been like that of so many other mining ventures in this and other western states, it appears without contradiction in the evidence, that the fair market value of this property at the time of the order of possession in 1910 was not less than $100,000.00, and there is as much reason to suppose that our property will develop into a great mine and add to the wealth and prosperity of the state, as existed at a like period in the history of many of our greatest producing properties. Although between the time that Dr. Talmage severed his connection with the property and until he next examined it as an expert employed in this case, the only additional work that had been done consisted of the extension of a cross-cut a distance of about one hundred feet, Mr. Bohm, a witness produced on behalf of the appellant, testified that this additional work in no way injured or decreased the value of the property, that as good indications for ore were disclosed in this cross-cut as were found in other parts of the property which event-

ually led into large ore bodies. This witness further states that more development work was not done "on account of lack of funds which had been promised and did not materialize." (Abs. 427-428.) The attention of this witness was directed to certain testimony he had given in the matter of the receivership of the North Utah Company in December, 1911, and he expressly states that he did not wish to be understood as stating or as expressing the opinion that the Red Wing Group was not then and is not now of great pecuniary value. (Trans. 1236-1237.) It further appears, by the testimony of this witness, that one of the respondents, to-wit, Isaac W. Dyer, on behalf of the mortgagees of the North Utah Company, who claimed under a trust deed securing an indebtedness of $463,000.00, bought in this property at the receiver's sale. (Trans. 1229-1232.)

IMPOSITION OF TERMS.

Counsel for appellant devoted the first eighty pages of their brief to a discussion of matters which, we respectfully submit, are not in issue upon this appeal. Every authority cited in support of their contentions here, relates to those immaterial matters. Counsel forcefully assert that under our Statute and in this particular action, the fee is not taken—that a mere easement is acquired by the condemnor. It is also contended with warmth that the condemnor may amend its original petition, surrender a portion of the property or rights therein sought to be condemned and may reserve to the owner of the fee various rights in, to and over the sur-

face which may not interfere with the enjoyment of its easement. In view of the fact that the Trial Court, whether rightly or wrongly, ruled with appellant as to all of these matters, the purpose of its counsel in devoting so much space to a discussion of the law on this question is not quite clear. The Trial Court held, and the respondents have at all times understood and admitted that an easement only, is here sought by appellant. The Trial Court held (we believe erroneously) that even after the lapse of four years since the order of and entry into possession and after respondents had rested their case, appellant might amend its petition in the manner sought. In view of its appearing without contradiction and conclusively that by the proposed amendment these respondents were surprised, the issues changed, new and different proof required, a continuance thereby rendered necessary, in excess of $3,500.00 thereby being lost to these respondents and in excess of $3,000.00 additional expense being rendered necessary in order to meet the changed issues, and its being further shown, conclusively and without contradiction, that no diligence on the part of the appellant in applying for leave to amend had been exercised and on the contrary that the reasons for amendment had existed for practically four years before the application was made, and it being further made to appear without contradiction that after all respondents had rested their case a carefully prepared typewritten brief was handed to them by counsel for appellant showing clearly that the intention to move to amend had been formed and determined by

appellant for some time at least prior to the closing of their case by respondents—the court imposed terms upon appellant in the sum of $1,750.00 only. As stated upon the oral argument, we believe that grave error was committed by the Trial Court in this matter, not in imposing excessive terms but in imposing grossly inadequate terms. In this connection we call attention to the affidavit of E. O. Leatherwood, Esq., (Abs. 332-343) to which affidavit there was no counter-affidavit or showing whatsoever made. The record is too voluminous to attempt any substantial narration of the evidence. It appears from the record in the case in numerous places that the physical presence of the railroad would prevent the sinking of a shaft in the vicinity of tunnel No. 1, where Dr. Talmage and others who have made a study of the property decided that a shaft should be located. During our preparation for the trial of the case under the issues as framed, we had, of course, made no calculations and were not prepared to submit to the jury any evidence relative to where we would place our shaft if we might dump on Tract A, nor relative to the cost of constructing tramways or other devices for reaching Tract A from such other shaft site, nor relative to the cost of transporting such material from such new shaft site to Tract A. No evidence had been introduced by us nor were we prepared to introduce evidence relative to what proportion of Tract A had been lost to us as dumping space by reason of the abutments, etc., even were we now permitted to dump on the now unoccupied portion thereof; nor were we prepared to offer evidence as to

the practicability of placing material on Tract A so as to utilize the unoccupied spaces between the abutments. It appeared from the evidence that several thousand tons of material had been deposited by appellant on Tract A since the order of possession, from the excavation of the railroad tunnel and other sources. We were wholly unprepared to furnish evidence, without a continuance, relative to the amount of dumping space which had already been taken from us, by the appellant occupied for more than four years and which could not be returned to us by the appellant either through the avenue of an amendment or otherwise. Moreover, since November, 1910, we had been absolutely kept from the possession or enjoyment of Tract A or any part thereof. During that interval, Dyer and the individual respondents, other than Robbins, had been compelled to buy in the property at receiver's sale. We have during all of those years, been expending large sums of money in defending what we deemed to be our rights in this cause, and it would have been the grossest kind of injustice to have permitted the proposed amendment upon even such terms as those offered by the court and by the appellant refused.

Under paragraph nine of the complaint and under the prayer thereof (Abs. 5-7), the appellant sought to condemn Tract A "and the whole thereof for an easement." In paragraph one of our answer (Abs. 11) we admitted all of the allegations contained in paragraphs five, six, seven and eleven of the complaint of appellant. In those admitted paragraphs it is alleged (Abs. 2-6)

that it is necessary for appellant to condemn an easement of right of way over, across, through and underneath the surface of the property in question and that if permitted to condemn this land for said right of way, the same would be put to beneficial and public use. It is true that there is a general denial of paragraphs eight, nine and ten of the complaint, but upon the trial of the cause (Trans. 1-4) reference was made to the stipulation made upon the first trial relative to the necessity of taking the property, and although the nature of the former stipulation does not appear in the Bill of Exceptions nor does the waiver or stipulation of Mr. Leatherwood in words technically cover the general denial of the allegations of paragraph nine of the complaint, we nevertheless respectfully submit that the record in substance discloses such waiver and we invite counsel to indicate any portion of the record wherein any contention was made or urged by the respondents, relative to the necessity of the taking of the property sought to be condemned. It was, of course, thoroughly understood by all parties, that there was no issue upon that question and the entire record fully supports this assertion.

However, it is entirely immaterial whether or not the necessity of taking all of this property was by respondents denied. Under Statutes like ours, such questions are preliminary questions for the decision of the court, and must be by the court disposed of before the trial of the question of damages by the jury. The above statement that such a question is one even for the court to determine is itself probably little less than a fiction.

> "It may be said to be a general rule that, unless a corporation exercising the power of eminent domain acts in bad faith or is guilty of oppression, its discretion in the selection of land will not be interfered with. With the degree of necessity or the extent which the property will advance the public purposes, the courts have nothing to do. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance."
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> Postal Telegraph Company v. O. S. L. R. R. Co., 65 Pac. at 739; 23 Utah 474.

In the absence of any charge of fraud or bad faith in our answer, a denial of the necessity of taking this property and the whole thereof for this public use would be merely surplusage. In any event it would be a preliminary question for the court, and aside from any of the foregoing considerations it must be conceded that we were brought to trial and required to produce evidence of the value of the estate sought to be taken, and the injury to the remaining tract. We did as we were required to do, and after we had rested our case, appellant sought to amend in such particular as necessitated entirely new and different evidence. What mysterious thing is there about a condemnation suit which should permit an amendment that would so seriously affect the rights of a party and cause him such serious financial loss as would have resulted from this proposed amendment, when in all other types of action, the courts of this and other states have not hesitated under circumstances much less aggravating than those here disclosed, to impose terms which would fully compensate the adverse

party for all losses occasioned through no fault of his own and occasioned confessedly through the fault and gross lack of diligence on the part of him seeking the amendment?

We respectfully submit that had all parties to this action assented to the proposed amendment, either with or without terms, the Trial Court should of its own motion, have refused to permit such an amendment. We submit that courts will take judicial notice of familiar laws of nature. It appears from the record that the ores coming from this property are in part sulphide ores. But aside from the character of these ores and their effect upon steel when saturated with moisture and placed in contact therewith, and even assuming that no low grade ore would be thrown upon the dump and that only ordinary country rock would be there deposited, there can be no possible question as to the effect of moisture upon the steel structure of this bridge, were we to be permitted to dump material about that structure. The storms of many seasons would not pass before the lives of every passenger traveling over that railroad would be menaced by such practice. The rolling of large boulders and rocks down the mountain side and against the cement abutments and steel work, would be a practice too dangerous to receive the sanction of any court. These litigants are not the only interested parties. It would seem that the protection of the traveling public would demand an inhibition of any such practice as that suggested by appellant in its proposed amendment. To quote from one of the authorities cited by appellant in its brief:

"If, however, the evidence shows the matter sought to be covered by the stipulation, would seriously impair the safety of the operation of the railroad to the traveling public, the court might properly refuse to permit the stipulation to be made."

Eldorado, etc., Co. v. Sims, 81 N. E. 782 (Ill.).

Also see another case cited by appellant:

Dillon v. Kansas, etc., R. Co., 67 Kan. 687, at 692-693.

For the proposition that the proposed amendment and the proposed offer or stipulation of appellant were amendments, we also call attention to the following cases cited by appellant:

Spokane, etc., Water Co. v. Jones & Co., 101 Pac. 515, at 517-518;

St. Louis & N. W. Ry. Co. v. Clark et al., 121 Mo. 195, 26 L. R. A. 751 at 765.

In the Missouri case last above cited, the Court holds, that if the proposed amendment results in surprise the owner of the fee is entitled to a continuance.

The power of the Court, under our Statute, to impose terms other than taxable court costs, and to compel the payment of such sum of money as will be just and proper under the circumstances of the particular case, we understand, was admitted by counsel for appellant upon the oral argument. Such has been the universal holding of the California courts under the same Statute existing in this state. In view of our understanding that this power of the court is admitted by appellant, we will merely call attention to the following cases:

Williams v. Myers, 89 Pac. 972 (Cal.);

Pomeroy v. Bell. 50 Pac. 683 (Cal.);

Culverhouse v. Croson, 29 Pac. 1100 (Cal.);

Jones v. Stoddart, 67 Pac. 650 (Ida.);

Moravian Seminary v. Bethlehem Borough, 153 Pa. St. 583, at 588-589;

In re Waverly Water Works Co., 85 N. Y. 479, at 482;

In re Board of Trustees of White Plains, 65 App. Div. N. Y. 417;

Nicoll v. Weldon, 130 Cal. 666;

Guidery v. Green, 95 Cal. 630;

Wise v. Wakefield, 118 Cal. 107;

Gray v. Lawlor, 151 Cal. 352;

Milwaukee, et al., R. Co. v. Stolze, et al., 76 N. W. 1113 (Wis.);

In re, etc., Jersey City, 31 N. J. L. 72.

During the oral argument, the Court inquired of counsel if there was any judgment other than the judgment entered on the verdict of the jury assessing damages in the case, which judgment appears on pages 701-704 of the Abstract. This is the only judgment which appears in the transcript. Under Sec. 3603, Compiled Laws of Utah, 1907, we assume that the final order of condemnation should not be made until the damages assessed have been paid. Although this Court has held our Statute permitting the occupation of the premises before compensation to the owner has been fixed and paid, to be constitutional, it would appear doubtful if a Statute would be constitutional which permitted a judgment of condemnation before satisfaction of the judg-

ment for damages assessed by the jury in such proceeding.

OTHER ALLEGED ERRORS.

In view of the fact that counsel cite no authorities and in their brief little more than mention other alleged errors assigned by appellant, we will discuss those matters as briefly as possible.

Assignments No. 7, 8 and 9, relate to the action of the Court in overruling the objections of appellant to questions asked Dr. Talmage concerning the market value of the Red Wing Group of claims on October 28, 1910. Counsel observe that the "proper elements" are not included in the questions. No suggestion is made as to what element is omitted. An inspection of the record will disclose that the estimate of value with and without the burden were those which, in the judgment of the witness, a person willing but not compelled to sell would receive from a person willing, able but not compelled to buy in Salt Lake County, on October 28th, 1910. (Abs. 104-5.)

Relative to the general qualifications of the witness and his competency to testify concerning the market value of properties we call attention to pages 285-288 of the transcript. His thorough competency as an expert and his intimate knowledge of mines and mining and familiarity with the market for properties throughout Utah and the west is disclosed in numerous places throughout his lengthy direct and cross-examination. His intimate and long study of this particular group of

claims likewise appears in numerous places throughout his testimony and we will call particular attention to pages 288-309 of the Transcript. He had general supervision of the work on the Red Wing Group from 1902 to 1906. (Trans. 324.) For a statement, in part, of his reasons for placing the estimate of value by him given upon this property, we invite the Court's attention to pages 597-605 of the Transcript. It is further suggested by counsel that between 1906 and 1913, Dr. Talmage had not been familiar with the property. As stated by Mr. Schulder upon the oral argument, practically no work had been done on the property during that period. In 1910 we were deprived of the ability to work this property through the action of appellant. As stated by Mr. Bohm, a witness called on behalf of appellant, the only development work that had been done up until 1910 was the running of a cross-cut a distance of about one hundred feet, which in no way injured the value of the property. We have not time or space to give the Court details relative to the large amount of evidence introduced on this subject, but we assert that the record, without contradiction, establishes that conditions were the same when Dr. Talmage left the property in 1906 as those existing at the time he gave his testimony. It is true that some surface leasing was carried on and Robbins had done some work on his lease in Tunnel No. 1; but Dr. Talmage visited that tunnel and those workings before the trial, and there is no evidence in the record that any work whatsoever, other than the one hundred feet of cross-cut, was prosecuted after Dr. Talmage ceased

the general supervision of the property, which in any way tended to open up new territory or change the conditions upon which he based his testimony.

It is further said that his testimony was remote and speculative. We submit, that the absence of ore bodies blocked out in a given territory does not preclude the introduction of evidence relative to the market value and that a property may have great market value without having any considerable ore in sight. As to the law on this phase of the question, we will make further reference later.

Assignment No. 10, relates to the overruling by the Court of the objection of appellant to a question put to Dr. Talmage wherein he was asked to assume that Robbins, the lessee, could not dump on Tract A. This matter, as suggested by appellant in its brief, is substantially discussed under a former heading. We believe it manifest that under the pleadings as they existed at the time the question was put and as they still exist, neither Mr. Robbins nor the other respondents had any right to dump waste material upon Tract A and it was therefore a perfectly proper assumption to make in the question complained of.

Assignment No. 11 relates to the same matter involved in assignment No. 10.

Assignment No. 12 relates to the overruling, by the Court, of appellant's objection to a question propounded to the witness Orem, wherein he is asked whether or not, in his judgment, as a practical mining man, a reasonably prudent, skillful mining man would expend money and

labor in extending Tunnels No. 1 and 2, with a reasonable expectation of getting a fair return in money from the discoveries that might be made. The claim is urged that the elements in the question are too speculative and remote. As heretofore remarked, we contend that it is no prerequisite to market value that known ore bodies be blocked out. If this is true, it is impossible to see how competent evidence of value can be presented to a jury unless the judgment of experienced, skilled mining men can be obtained relative to the likelihood of discovering ore by extending exploration. Practically the identical question here complained of was held to be a proper question in the following Colorado case:

Wilson v. Harnette, 75 Pac. 395 (Colo.).

Also see:

Noyes v. Clifford, 94 Pac. at 845 (Mont.);

Montana Railway v. Warren, 137 U. S. at 352, 34 L. Ed. 681.

Assignment No. 13 relates to the overruling of appellant's objection to a question propounded to the witness Orem, wherein he is asked to state his judgment relative to the market value of this group of claims. This question is a continuation of a former question put to the same witness found on pages 675-676 of the Transcript in which he is asked to state what a person willing but not compelled to sell would receive for this group of claims in the fall of 1910 at Bingham, Salt Lake County, State of Utah, from a buyer who was willing and able but not compelled to buy. The competency of this witness seems to be the only matter urged in this connection.

We again call attention to the evidence heretofore referred to, to the effect that the property was in the same condition at the time of the order of possession as in 1906. This witness testified that since 1896 he has followed the mining business. From 1907 to 1909 he was attending the Institute of Technology in Boston, where he took a course in mining engineering. He worked at this property from 1897 until 1907 when he left for school and being, at the time he left, in charge of the property. (Trans. 663-664.) His acquaintance with the property appears conclusively to have been of the most intimate character. Among other ore bodies, he described the Jumbo Stope on No. 2 level, in which there was a great deal of first class ore running forty per cent lead and from $2.00 to $12.00 in gold and silver. This stope, at the time it caved (this cave occurred in about the year 1899) was twenty feet between the walls and seventy-five to eighty feet long. (Trans. 670-671.)

About seventy-five per cent to eighty per cent of the territory embraced within the Red Wing Group, Mr. Orem states, is unexplored territory. He has been associated with the firm of A. J. Orem & Company as a member since its organization in 1904. Its business, during all of that time, has been that of buying and selling mines. He has, at all times, been familiar with its business and while in school at Boston, kept in constant touch with its Boston office and during all of that period that company has been engaged in buying and selling mines throughout the west including Utah. (Trans. 681-683.) From the time he left the property in 1907 until

and including 1910, he kept in touch with the mining situation in Salt Lake County and the transactions in mining property throughout the country. (Trans. 677.) He had knowledge of sales of various kinds of mining properties, some located in Bingham, including the sale of this group of claims to the North Utah Company in 1907. (Trans. 675.) We respectfully submit, that if Mr. Orem, whose business during all of the years in question, was that of buying and selling mines and mining property and working and operating the same, is not a competent witness, then it would be useless to search for a witness whose competency would not be denied. When this witness stated that the market for Bingham properties was largely an eastern market he did nothing more than state a fact which is well known to everyone and this statement certainly in no way affected his competency. Had he asserted the contrary it might have given rise to a just suspicion that he was not very familiar with deals in Bingham properties. Had there been merit in appellant's objection to the testimony of the witness Orem, relative to the market value of the Red Wing Group, it would be harmless error since the sole matter of importance on the trial was the damage suffered by respondents as a result of the taking of the property sought to be condemned. The witness was allowed to testify, without any objection whatsoever being interposed, that in his judgment the damage sustained by reason of the taking by appellant was the sum of $35,000.00. (Trans. 683-4.)

In assignment No. 14 appellant complains of the order of the Court sustaining an objection to a question put by counsel for appellant to the witness Sterling Talmage, wherein he sought to inquire of the witness whether ore of a certain metallic contents was "commercial ore." This witness, on his direct examination, gave no testimony whatsoever, relative to what is or is not commercial ore; he did not pretend to have any knowledge whatsoever relative to freight or treatment charges, or assay charges or cost of mining. He was not produced as a witness on any of those matters nor did he give any testimony concerning any of them. An inspection of his testimony, which appears on pages 90-93 and 279-283 of the transcript, discloses that the sole matters gone into with the witness were the time and place of taking certain samples, and he merely read from the certificate of the assayer what was there recited, Mr. Ellis having waived (Trans. 280) any verification by the assayer of the certificate. Although the sustaining of the objection was so manifestly proper that no pretext for criticism exists, we call attention to the fact that the method of arriving at what is and what is not commercial ore—the freight, treatment, and assay charges, the cost of mining, etc., were all gone into fully by other witnesses both for appellant and respondent; the particular sample to which the attention of the witness was directed in the question, was made the subject matter of questions put to other witnesses, and careful computations were made by those competent to make them relative to the commercial value of this sample and of all other samples taken by both sides.

The only remaining matter discussed by appellant which concerns these respondents is the claim that we might build a track across the right of way at small cost and dump to the east of Tract A. This matter has already been discussed at sufficient length. Under the evidence, heretofore referred to, there was no available dumping space at that point. Under the pleadings, we could not construct a track or other permanent structure upon Tract A. At no time did appellant offer any amendment conceding us that right. Of course, under the proposed amendment, we would have had that right among numerous other rights; but no amendment was made and under the pleadings we could not construct a track or other permanent structure upon the right of way. Under the authorities cited by appellant in its brief, the use to which the owner of the fee might put any portion of the right of way was one which did not exclude the owner of the easement from any portion of the property subject to the easement. As stated in the Atchison case, 62 Kan. 416, the right of the owner of the fee to pass over the right of way was that of a mere licensee and could not ripen into a prescriptive right and might be terminated at the pleasure of the owner of the easement. The same holding was made in the East Tennessee Railroad case, 10 L. R. A. 855, which is cited by appellant. No Court, whatever may be its views relative to concurrent user, has ever refused to follow the doctrine laid down in the Kansas Central Railroad Co. case, 45 Kan. 716, cited by appellant, wherein the Court says, at 719:

> "And although the property is taken ostensively for a public purpose, yet all the authorities agree that the railroad company, by procuring its right of way and paying for it, procures an actual, individual, private right, an easement and an estate paramount to the rights or interests of all others, except the right of the state to again subject the land to be taken under the power of eminent domain."

Under all of the authorities, the right of the condemnor is the paramount right and the right of the owner of the fee is the servient right. As pointed out by the Texas Court in the case cited below this paramount right exists in and to every part and portion of the land condemned. The right of the railroad company under the pleadings in this case is paramount to the right of the respondents in and to every square inch of the surface of Tract A. Therefore, even were there any merit to the contention of appellant that we might freely cross over the surface of Tract A or drive animals or teams thereover, such conclusion would in no way indicate that we had the right to erect any permanent structure thereon. To hold that we had the right to erect a permanent structure upon Tract A would be to hold that our right was not servient, but was paramount and dominant as to so much of the surface as might be covered by such structure. The courts of every shade of opinion repudiate such theory. For an excellent statement of the reasons for the rule as we contend it to be, we invite the Court's attention to the following cases:

Olive v. Sabine R. Co., 33 S. W. 139 (Tex.).

Also see:

Cunningham v. Rome R. Co., 27 Ga. 499;
Cairo, etc., R. Co. v. Brevort, 62 Fed. 129.

In conclusion we earnestly insist that if any injustice was done upon the trial of this cause, either by the Court or by the jury in its assessment of the damages, the respondents and not the appellant were the recipients of that injustice. The cause has been tried twice. Appellant has surely had its day in court and a fair and impartial trial. The record in this case is free from error to an extraordinary degree, considering the length of the trial and the matters involved. We confidently assert that no error prejudicial to the rights of appellant was committed by the Trial Court.

Respectfully submitted,

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